IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-33060

RANDI N. FUCHS

Debtor

RANDI N. FUCHS

Plaintiff

v. Adv. Proc. No. 01-3150

EDUCATIONAL CREDIT MANAGEMENT CORP., FIRST TENNESSEE BANK NATIONAL ASSOCIATION

Defendants

M E M O R A N D U M

APPEARANCES: HORACE M. BROWN, ESQ.
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

By her Complaint filed September 21, 2001, the Debtor seeks a discharge of her student loan obligations pursuant to the undue hardship provisions of 11 U.S.C.A. § 523(a)(8) (West Supp. 2002). This matter was tried on July 17, 2002. The record before the court consists of twenty-one exhibits stipulated into evidence, a written Stipulation of Debtor and Educational Credit Management Corporation, and the testimony of the Debtor and her supporting witnesses.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Debtor has twenty-two student loans which have been assigned to Defendant Educational Credit Management Corp. (ECMC).[1] These obligations, as of July 10, 2002, total $77,268.01, including $3,473.43 interest, with additional interest of $9.38 accruing daily.

The loans, distributed between March 1992 and November 2000, enabled the Debtor to attend Middle Tennessee State University, Austin Peay University, Maryville College, Lincoln Memorial University (LMU), and the University of Tennessee over an eight-year period which was interrupted briefly by the January 1996 birth of her son. The Debtor eventually earned both a Bachelor of Arts degree from Maryville College and a master's degree in administration and supervision from LMU. The Debtor also holds a Beginning Administrator License, for prekindergarten through twelfth grade, from the Tennessee Department of Education.

[1] The Debtor's Complaint was filed against Tennessee Student Assistance Corporation (TSAC) and First Tennessee National Bank Association (First Tennessee). By Order entered January 4, 2002, ECMC was substituted for TSAC as the party defendant, and First Tennessee was dismissed without prejudice.

The Debtor is thirty years old, intelligent, well-spoken, and in apparently good health. After working various part-time jobs during her years of college, the Debtor recently completed her first year of employment as a first grade teacher. She has made no payments on her student loans, which became due, after numerous deferments, in December 2001. The Debtor filed her Voluntary Chapter 7 Petition on June 20, 2001, eventually discharging more than $43,000.00 in credit card debt.

The Debtor claims a net monthly income of $1,882.26[2] and net monthly expenses of $1,874.86. She lives in public housing with rent costing $323.00 per month. Additional expenses include $96.00 per month in cellular and home telephone expenses, $50.37 for cable television, $100.00 for recreation, and $9.95 for internet connection. Since filing her bankruptcy, the Debtor has purchased a 1998 Ford Explorer, with monthly payments of $348.70 for 54 months, and a Dell computer, with monthly payments of $27.84 for 48 months.[3]

II

Student loans are nondischargeable in bankruptcy except for the rare cases in which such treatment would cause an ?undue hardship" for the debtor and the debtor's dependents. *See* 11 U.S.C.A. § 523(a)(8) (West Supp. 2002). ?Undue hardship" is not defined by the Bankruptcy

[2] This figure should be higher. The Debtor testified that she has the opportunity to work various ?intercession programs" during school breaks. According to the Debtor, these programs pay between $250.00 and $500.00 depending upon the number of hours worked. Additionally, the Debtor is projected to receive at least a two or three percent raise for the coming school year, although she testified that the pay increase will be partially offset by higher medical bills.

[3] The Debtor testified that her sport utility vehicle was a necessary replacement for her former car, a 1993 Ford Tempo, which ceased running. The Debtor further testified that she needs a computer for various work-related projects.

Code, but the Sixth Circuit has endorsed the use of the Second Circuit's *Brunner* test, under which a debtor may prove undue hardship by showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a ?minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period . . .; and
>
> (3) that the debtor has made good faith efforts to repay the loans.

Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 437 (6th Cir. 1998) (quoting *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994) (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam))). Debtors bear the burden of proof by a preponderance of the evidence. *See Grogan v. Garner*, 111 S. Ct. 654, 660 n.14 (1991).

Under the first element of the *Brunner* test, the court should examine the overall living situation of the debtor, paying particular attention to the necessity of expenses and whether the debtor has maximized her income opportunities. *See Afflitto v. United States of America (In re Afflitto)*, 273 B.R. 162, 170 (Bankr. W.D. Tenn. 2001). The court may require financial belt-tightening where certain expenses appear to be unnecessary or extravagant. *See Grine v. Tex. Guaranteed Student Loan Corp. (In re Grine)*, 254 B.R. 191, 197 (Bankr. N.D. Ohio 2000).

Under *Brunner's* second prong, a debtor must show that her financial adversity is ?more than a temporary state of affairs." *Swinney v. Academic Fin. Servs. (In re Swinney)*, 266 B.R. 800, 805 (Bankr. N.D. Ohio 2001). If it is likely that the debtor's financial situation will improve,

then the debt should not be discharged. *See Markley v. Educ. Credit Mgmt. Corp. (In re Markley)*, 236 B.R. 242, 247 (Bankr. N.D. Ohio 1999). ?The clear purpose of this requirement is to ensure that the hardship the debtor is experiencing is actually ‹undue,' as opposed to the garden variety financial hardship experienced by all debtors who file for bankruptcy relief." *Kirchhofer v. Direct Loans (In re Kirchhofer)*, 278 B.R. 162, 167 (Bankr. N.D. Ohio 2002).

> Lastly, factors relevant to a debtor's good faith efforts toward repayment include:
>
> (1) the portion of the loan actually repaid by the debtor;
>
> (2) whether a debtor's failure to repay the obligation is truly from factors beyond the debtor's reasonable control;
>
> (3) whether the debtor has realistically used all her available financial resources to pay the debt;
>
> (4) whether the debtor has, in fact, attempted to repay the student loan at all;
>
> (5) the length of time after the student loan first becomes due that the debtor seeks to discharge the debt; and
>
> (6) the percentage of the student loan in relation to the debtor's total indebtedness.

Wilcox v. Educ. Credit Mgmt. (In re Wilcox), 265 B.R. 864, 870 (Bankr. N.D. Ohio 2001).

The court finds that the Debtor has not met her burden in relation to any element of the *Brunner* test. As for the first prong, the Debtor maintains at least $150.37 per month in recreational expenses (recreation budget and cable television) and has an excessive monthly phone bill.[4] *See Grine*, 254 B.R. at 197. By comparison, the Debtor's initial student loan installments

[4] The Debtor's testimony regarding the frugality and necessity of her phone expenses is inconsistent with the actual phone bills stipulated into evidence. For example, the Debtor testified that she maintains only ?basic" home phone service. Her bills indicate, however, that she subscribes to a ?Complete Choice Plan" offering numerous premium (continued…)

under a 300-month Income Contingent Repayment Plan (ICRP)[5] would be only $95.75 per month for the remainder of 2002.[6] Considering these facts and the availability of additional income through "intercession programs" or other part-time work, the court cannot find that the Debtor would be unable to maintain a "minimal" standard of living for herself and her son if forced to repay her student loan obligations. *See Hornsby*, 144 F.3d at 437.

As for *Brunner's* second prong, the Debtor is only one year into her career. Her professional future, while far from guaranteed, is promising. The Debtor is healthy, intelligent, and the holder of an administrator's license and two college degrees. Her teaching income should steadily increase and, after two more years, she will be eligible to apply for higher-paying administrative jobs (such as principal or assistant principal). Additionally, her car and computer payments end within four years and her bankruptcy has freed her from more than $43,000.00 in

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[4](…continued)
features. Similarly, the Debtor testified that she needs a cell phone for emergencies (in the event that her car were to break down or there were to be a problem with her son). Her bills, however, show that her usage frequently exceeds 500 minutes per month, indicating a cell phone package far in excess of what is necessary for mere emergency use.

The Debtor's testimony relating to her cable television subscription is equally inconsistent. She stated that she receives "just the basic channels," but her bills show a $29.91 monthly charge for "Expanded Basic" service.

[5]
> The U.S. Department of Education also offers a number of student loan repayment options. One of which is referred to as the income contingent repayment plan (ICRP). See 20 U.S.C. § 1078(m). ICRP repayment terms are available for most defaulted loans held by the Department of Education. The annual amount payable under an ICRP by a borrower is the lesser of (1) the amount the borrower would repay annually over twelve years or (2) twenty percent (20%) of discretionary income. See, 20 U.S.C. § 1087(a), et seq.; 34 C.F.R. § 685.209(a)(2)(i) and (ii).

Douglass v. Great Lakes Higher Educ. Servicing Corp. (In re Douglass), 237 B.R. 652, 657 (Bankr. N.D. Ohio 1999).

[6] Based on the Debtor's increased income from 2001 to 2002, her ICRP payments would increase in 2003. The exact amount of the increase was not established at trial, but the parties agree that the higher 2003 payments would be less than double ($191.50) the 2002 ICRP amount.

credit card debt. Because the Debtor's financial situation is likely to improve, her student loan obligations should not be discharged. *See Markley*, 236 B.R. at 247.

Lastly, in considering *Brunner's* good faith test, the court notes that the Debtor has made no payments whatsoever on her loans. She testified to investigating various consolidation options but has not seriously considered the more substantial loan restructuring offered by the ICRP program.[7] The Debtor's failure to even attempt participation in a program such as the ICRP - while simultaneously maintaining, *inter alia*, cable television and a recreational budget - is hardly indicative of good faith.[8]

In sum, the Debtor underwent a nearly ten-year educational journey funded in substantial part by student loans. She willingly chose the relatively low-paying field of education.

> The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.

In re Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993).

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[7] *See supra* n.5. **?**The maximum repayment period under the income contingent repayment plan is 25 years." 34 C.F.R. § 685.209(c)(4)(i). **?**If a borrower has not repaid a loan in full at the end of the 25-year repayment period under the income contingent repayment plan, the Secretary cancels the unpaid portion of the loan." 34 C.F.R. § 685.209(c)(4)(iv).

[8] On cross-examination, the Debtor testified that repayment of her student loans would interfere with other more desirable uses of her money (she would like to move into nicer housing; she would like to pay for her son's future college education; she does not want to be bound to a twenty-five year ICRP program). Such testimony reveals that educational loan repayment, rather than being an undue hardship, is simply not a financial priority for this Debtor.

At trial, the Debtor's counsel made frequent reference to the ?hardship" that the Debtor would encounter if forced to repay her student obligations. However, under § 523(a)(8), Congress has made it clear that mere hardship is not enough. *See* 11 U.S.C.A. § 523(a)(8) (?undue hardship"); *Kirchhofer v. Direct Loans (In re Kirchhofer)*, 278 B.R. 162, 167 (Bankr. N.D. Ohio 2002) (?[T]he hardship the debtor is experiencing [must actually be] ‹undue,' as opposed to the garden variety financial hardship experienced by all debtors who file for bankruptcy relief."). The Debtor has failed to meet her burden of showing undue hardship under *Hornsby* and *Brunner*. Accordingly, her student loans are nondischargeable.

A judgment consistent with this Memorandum will be entered.

FILED: July 22, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendants

J U D G M E N T

For the reasons stated in the Memorandum filed this date, containing findings of fact and conclusions of law as required by FED. R. CIV. P. 52(a), it is ORDERED, ADJUDGED, and DECREED that the Plaintiff Randi N. Fuch's obligations to the Defendant Educational Credit Management Corp. on the twenty-two student loans which are the subject matter of this adversary proceeding are nondischargeable.

ENTER: July 22, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE